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No. 92-1838

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In the Supreme Court of the United States

OCTOBER TERM, 1993

WILBUR BROWN, PETITIONER

v.

LLOYD BENTSEN, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.*, which comprehensively addresses federal employment disputes, precludes petitioner from seeking other remedies for termination of his temporary appointment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-13) is not reported, but the decision is noted at 979 F.2d 854 (Table). The opinion of the district court (Pet. App. 14-20) is not reported.

JURISDICTION

The court of appeals entered its decision on November 18, 1992, and it denied a petition for rehearing on January 14, 1993. See Pet. App. 1. The petition for a writ of certiorari was filed on April 13, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, establishes a comprehensive scheme for adjudicating federal employee challenges

to agency employment decisions. The CSRA specifically provides that if an agency discharges a worker who meets the definition of "employee" in 5 U.S.C. 7511(a)(1)(A), the worker may appeal his dismissal to the Merit Systems Protection Board (MSPB), 5 U.S.C. 7701(a), and may seek judicial review of the MSPB's decision, 5 U.S.C. 7703. That statutory procedure precludes resort to other remedies. See *United States* v. *Fausto*, 484 U.S. 439, 446-447 (1988); *Bush* v. *Lucas*, 462 U.S. 367 (1983).

The Office of Personnel Management (OPM) allows federal agencies to hire temporary workers in certain circumstances. See 5 C.F.R. 316.401. A worker serving a temporary appointment in the competitive service is not, however, an "employee" within the meaning of Section 7511(a)(1)(A) of the CSRA, and hence is not entitled to the MSPB and judicial remedies available to those persons. See *Antolin* v. *Department of Justice*, 895 F.2d 1395, 1397 (Fed. Cir. 1989), cert. denied, 498 U.S. 868 (1990).[1]

2. Petitioner is an African-American male who was employed at the United States Mint in San Francisco. C.A. Exc. Rec. Exh. D at 3. On July 27, 1987, petitioner was hired as a trainee Metal Forming Machine Operator under a temporary appointment scheduled to expire on July 26, 1988. C.A. Supp. Exc.

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[1] The CSRA defines the term "employee" in relevant part as "an individual in the competitive service * * * who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less." 5 U.S.C. 7511(a)(1)(A). The court in *Antolin* ruled that "[u]nder the plain language of the statute, even when an individual serves a series of temporary appointments of one year or less, that individual does not become an employee for the purpose of § 7511(a)(1)." 895 F.2d at 1397.

Rec. 1. Petitioner completed his training a few months later. On December 6, 1987, he was hired as a Metal Forming Machine Operator under a second temporary appointment scheduled to expire on December 5, 1988. *Id.* at 2. The form authorizing petitioner's appointments stated that "THIS APPOINTMENT MAY BE TERMINATED AT ANY TIME IF YOUR SERVICES ARE NO LONGER NEEDED OR FUNDS ARE NOT AVAILABLE." *Id.* at 1, 2 (capitalization in original). See Pet. App. 3.

The United States Mint initiated a routine background investigation, known as a National Agency Check and Inquiries, to assist the agency in determining petitioner's suitability for employment. The preliminary report revealed that several years earlier petitioner had been tried for and acquitted of murder. C.A. Supp. Exc. Rec. 3. Police records indicated that petitioner had acknowledged at trial that he fired the fatal shot, but he had denied that he had intended to kill the victim. *Id.* at 6. The Mint's Chief of Security/Internal Review instructed Mint security personnel to interview petitioner concerning the incident, but on the advice of counsel, petitioner declined to answer questions. *Id.* at 3, 4, 7. On August 17, 1988, petitioner was dismissed from his position for "failure to cooperate in a security investigation." *Id.* at 10.

3. Petitioner appealed his dismissal to the MSPB and subsequently amended his appeal to allege, *inter alia*, discrimination based on race. On December 16, 1988, the MSPB Administrative Judge dismissed the appeal on the ground that the MSPB lacked jurisdiction over his claim. The judge concluded that petitioner did not qualify as an "employee" under 5

U.S.C. 7511(a)(1)(A), because he was serving in a temporary appointment. C.A. Supp. Exc. Rec. 12-13.

Petitioner subsequently filed suit in federal district court. The first four claims of petitioner's amended complaint alleged that he had been discharged because of his race and/or in retaliation for his prior complaints regarding alleged racial discrimination at the United States Mint. The fifth claim alleged that "the U.S. Mint has violated [petitioner's] procedural due process rights afforded under the Fifth Amendment to the United States Constitution and 5 U.S.C. § 7532." C.A. Exc. Rec. Exh. D at 10. The district court dismissed the complaint in its entirety. Pet. App. 14-20.[2]

Petitioner appealed and challenged the dismissal of his procedural due process claim. The court of appeals affirmed. Relying on its prior decision in *Saul* v. *United States*, 928 F.2d 829 (9th Cir. 1991), the court held that the CSRA's comprehensive remedial scheme precluded petitioner's due process claim. The court explained that

> [petitioner's] argument turns CSRA on its head. He suggests that CSRA's statutory scheme allows temporary employees immediate access to the federal district courts for their unconstitutional discharge claims while permanent

[2] Petitioner appears to have abandoned his reliance on 5 U.S.C. 7532. Section 7532 applies when the government invokes national security concerns for expedited suspension or dismissal of an employee who would otherwise be entitled to more extensive procedural protections. But Section 7532 procedures need not be followed when, as here, the agency is authorized to terminate an employee summarily without reference to national security. See *Carlucci* v. *Doe*, 488 U.S. 93, 100, 102 (1988).

> employees must seek administrative review through the MSPB for identical claims with judicial review available only in the Federal Circuit. 5 U.S.C. 7513(d), 7703. Brown's logic undermines "the preferred position of certain categories of employees" under CSRA and drains the MSPB of its "primacy . . . for administrative resolution of disputes over adverse personnel action." *Fausto*, 484 U.S. at 449.

Pet. App. 9-10. The court also rejected petitioner's contention that the CSRA should not preclude his claim for equitable relief from an alleged constitutional violation, noting that the argument was contrary to circuit precedent. *Id.* at 10.

Judge Hall separately concurred, stating that affirmance was appropriate without regard to the preclusive effect of the CSRA, "because [petitioner's] due process claim is untenable." Pet. App. 12. She explained that petitioner's Fifth Amendment claim could not succeed unless petitioner had possessed a liberty or property interest in continued government employment. Petitioner had alleged no facts demonstrating that his dismissal had deprived him of a liberty interest, and, as a temporary employee, petitioner had no property interest in retaining his job. Pet. App. 13.

ARGUMENT

1. The court of appeals correctly concluded that the CSRA precludes the relief petitioner seeks on his employment claims. The CSRA provides for review of final decisions of the MSPB in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7703. A prerequisite to Federal Circuit review, however, is that the MSPB must itself have juris-

diction over a plaintiff's challenge. In the present case, the Administrative Judge correctly held that the Board lacked jurisdiction, explaining that "[a]n 'employee' who may appeal a separation or removal to the Board is defined, in relevant part, as 'an individual in the competitive service . . . who has completed 1 year [of] current continuous employment *under other than a temporary appointment limited to 1 year or less*.'" C.A. Supp. Exc. Rec. 12-13 (quoting 5 U.S.C. 7511(a)(1)(A)) (emphasis and ellipsis in Administrative Judge's opinion). The CSRA provides petitioner with no right of judicial review of the claims he asserts here and, by necessary implication, precludes relief through other statutory mechanisms, including the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See Pet. 4 n.1.[3]

This Court has emphasized that "[a] leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action." *Fausto*, 484 U.S. at 444. The exclusion of certain workers (including temporary workers such as petitioner) from the definitional

[3] In the court of appeals, petitioner conceded that the Administrative Judge was correct in holding that the MSPB lacked jurisdiction. See Appellant's C.A. Br. 6 ("The MSPB judge found, correctly, that [petitioner] was a temporary employee whose claims were not within the jurisdiction of the MSPB."). If petitioner had wished to contest that holding, the proper course would have been to file a petition for review to the Board and/or an appeal to the United States Court of Appeals for the Federal Circuit. See 5 C.F.R. 1201.113, 1201.114; *Ballentine* v. *Merit Systems Protection Board*, 738 F.2d 1244, 1247 (Fed. Cir. 1984); *Rosano* v. *Department of the Navy*, 699 F.2d 1315, 1316-1318 (Fed. Cir. 1983); *Wall* v. *United States*, 871 F.2d 1540, 1543-1544 (10th Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

sections of Chapter 75 of the Act, see, *e.g.*, 5 U.S.C. 7511, "displays a clear congressional intent to deny the excluded employees the protections of Chapter 75 —including judicial review—for personnel action covered by that chapter." 484 U.S. at 447. As the Court additionally stated, "[i]t seems to us evident that the absence of provision for these employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory entitlement to review for adverse action of the type governed by Chapter 75." *Id.* at 448-449.[4]

Petitioner's reliance on *Webster* v. *Doe*, 486 U.S. 592 (1988), see Pet. 24-26, is misplaced. This Court held in *Webster* that an employee of the Central Intelligence Agency—an agency whose employment practices are *not* covered by the comprehensive remedial provisions of the CSRA—could seek APA review of a colorable constitutional challenge to his dismissal. 486 U.S. at 603-604. That case is readily distinguishable from this one. To be sure, petitioner, as a temporary worker, was not entitled to invoke the *judicial review* provisions of the CSRA. But unlike the plaintiff in *Webster*, he had other CSRA remedies.

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[4] Significantly, temporary workers may seek judicial relief in some circumstances. For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, may provide a remedy for unlawful discrimination if the statutory prerequisites are met. See, *e.g.*, *Theard* v. *United States Army*, 653 F. Supp. 536 (M.D.N.C. 1987). *Fausto* makes clear, however, that petitioner cannot obtain judicial review simply by invoking the court's general federal question jurisdiction. Rather, petitioner must identify a specific statute that creates a cause of action.

A temporary worker at the Treasury Department who alleges a "prohibited personnel practice," see 5 U.S.C. 2302, may petition the Office of Special Counsel (OSC) of the MSPB to investigate, and if the OSC concludes that the allegation is meritorious, the OSC may request the MSPB to take appropriate remedial action. See 5 U.S.C. 1206(a)(1), 1206(c)(1)(A) and (B). See also *Spagnola* v. *Mathis*, 859 F.2d 223, 225 & n.3 (D.C. Cir. 1988) (per curiam en banc). Those statutory provisions governing "prohibited personnel practices"—which petitioner did not invoke—were not available to the plaintiff in *Webster*. See 5 U.S.C. 2302(a)(2)(C)(ii).[5]

2. Petitioner contends that the court of appeals' decision in this case conflicts with decisions of the District of Columbia Circuit. See Pet. 16-22. Peti-

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[5] Petitioner also contends that the decision below is contrary to this Court's "summary reversal" in *Bryant* v. *Carlucci*, 488 U.S. 806 (1988). See Pet. 27. That claim is wholly without merit. This Court's decision in *Bryant* was not a summary reversal at all; rather, the Court granted certiorari, vacated the judgment below, and remanded the case for further consideration in light of *Webster*. Although that disposition reflects this Court's view that consideration of the CSRA preclusion issue would be informed by the decision in *Webster*, it was not a holding on the merits. On remand the Fourth Circuit noted that "*Webster* does not directly control this case, because the CSRA did not apply to the CIA employee in that case." *Bryant* v. *Cheney*, 924 F.2d 525, 528 (1991). The Fourth Circuit acknowledged that "by vacating this court's previous ruling, the Supreme Court at least suggested that *Webster*'s admonitions might have relevance" to the issue of CSRA preclusion. *Ibid.* The court declined to resolve the issue, however, because it concluded that the plaintiff lacked standing to pursue a claim for declaratory or injunctive relief. *Id.* at 528-529.

tioner relies principally on *Spagnola* v. *Mathis*, *supra*, in which the D.C. Circuit noted that "time and again this court has affirmed the right of civil servants to seek equitable relief against their supervisors, and the agency itself, in vindication of their constitutional rights." 859 F.2d at 229-230. The D.C. Circuit's statement in that case, however, provides an insufficient conflict with the Ninth Circuit's decision in this case to warrant further review.

As an initial matter, the D.C. Circuit's statement in *Spagnola* was dictum. The D.C. Circuit granted rehearing en banc in *Spagnola* to consider the availability of so-called *Bivens* remedies in the federal employment context, see 859 F.2d at 224, and the en banc court specifically ruled that *Bivens* remedies were precluded. *Id.* at 230. Accordingly, the D.C. Circuit's decision in *Spagnola* does not pose a genuine conflict with the court of appeals' decision in this case, and review by this Court would not be warranted unless the D.C. Circuit were expressly to reaffirm its view in a future case in which the issue is squarely presented.

This Court's review would be particularly improvident, because the D.C. Circuit's decision in *Spagnola* did not discuss this Court's decision in *Fausto*, which is the leading decision on the CSRA's preclusive effect. The D.C. Circuit's dictum in *Spagnola* cited pre-*Fausto* cases, see 859 F.2d at 230, which now have dubious precedential value, and that court has not had a square opportunity to reconsider its precedents in light of the *Fausto* decision. Given the general agreement among the post-*Fausto* decisions from other courts of appeals that the CSRA

does preclude judicial review through other mechanisms,[6] review by this Court is unwarranted at the present time.

3. For the foregoing reasons, the court of appeals' ruling that the CSRA precludes petitioner's constitutional claim does not warrant review. But even if that issue merited review, this case would not be an appropriate one in which to decide it, because petitioner's constitutional claim is completely without merit. Petitioner invokes the Fifth Amendment's guarantee that no individual shall "be deprived of life, liberty, or property, without due process of law." The Fifth Amendment is inapplicable here, however, because the United States Mint's termination of petitioner's employment did not effect a deprivation of liberty or property.

This Court's decisions make clear that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). In the context of public employment, the Court has held that the existence of a property interest in one's job depends upon the employment status of the affected individual. If an employee has explicitly or implicitly been granted tenure—a guarantee that he can be removed from his position only for cause—his job is regarded as a species of

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[6] See, *e.g.*, *Saul* v. *United States*, 928 F.2d 829, 843 (9th Cir. 1991); *Lombardi* v. *Small Business Administration*, 889 F.2d 959, 961-962 (10th Cir. 1989); *Stephens* v. *HHS*, 901 F.2d 1571, 1574-1576 (11th Cir.), cert. denied, 498 U.S. 998 (1990); see also *Braun* v. *United States*, 707 F.2d 922, 926-927 (6th Cir. 1983).

property, and he may invoke the Due Process Clause of the Fifth or Fourteenth Amendment. See, *e.g.*, *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 538-539 (1985). But if the worker's employment is terminable at the will of his employer, the employee has no property interest in his position. See, *e.g.*, *Bishop* v. *Wood*, 426 U.S. 341, 344-347 (1976).[7]

Petitioner clearly possessed no property interest in continued federal employment. At the time of his dismissal, petitioner was serving under a temporary one-year appointment pursuant to 5 C.F.R. 316.402(b)(4). See C.A. Supp. Exc. Rec. 2. That appointment was accompanied by no explicit or implicit understanding that petitioner could be discharged only for cause. To the contrary, the document that authorized petitioner's appointment stated that "THIS APPOINTMENT MAY BE TERMINATED AT ANY TIME IF YOUR SERVICES ARE NO LONGER NEEDED OR FUNDS ARE NOT AVAILABLE." *Ibid.* (capitalization in original). Absent some "legitimate claim of entitlement to" continued federal employment, *Roth*, 408

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[7] We do not suggest that petitioner could have been dismissed for any reason whatsoever. The CSRA identifies certain prohibited personnel practices. See 5 U.S.C. 2302. For example, even a temporary employee may not be dismissed on the basis of race, 5 U.S.C. 2302(b)(1)(A), or in retaliation for his disclosure of information concerning illegality or gross mismanagement on the part of agency officials. 5 U.S.C. 2302(b)(8). But the existence of some impermissible bases for agency action is not equivalent to a guarantee that a worker may be discharged only for cause: were that equation valid, *every* public employee would possess a property interest in the retention of his job, since the Constitution always imposes some constraints on a public employer's authority to dismiss its workers.

U.S. at 577, petitioner's dismissal was not a deprivation of property triggering the protections of the Fifth Amendment's Due Process Clause. And because the statutory scheme is specifically designed not to confer any property interest that might, in turn, trigger procedural due process rights in connection with a termination, the omission from the statutory scheme of a provision for raising such a procedural due process claim in court raises no serious constitutional question. Moreover, as the concurring judge recognized below, petitioner "did not allege any facts demonstrating that his dismissal from the Mint violated a protected liberty interest." Pet. App. 13.

Because petitioner was not deprived of any constitutionally protected property or liberty interest, his Fifth Amendment claim is without merit. This Court's resolution of the CSRA preclusion issue therefore could not affect the ultimate outcome of the lawsuit.[8]

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[8] Relying on *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), petitioner argues (Pet. 15) that temporary employees dismissed on security-related grounds are entitled to procedural due process protections. *Vitarelli*, however, did not so hold. That case simply recognized that if an agency has promulgated a rule providing special procedures for national security-related dismissals—and if the agency then discharges an employee on national security grounds—the agency must abide by its rule. See 359 U.S. at 539. *Vitarelli* in fact proceeded on the premise that an employee who does not have civil service protection otherwise could be "summarily discharged by the Secretary at any time without the giving of a reason." *Ibid.*

Petitioner also argues that Exec. Order No. 10,450 "is inapplicable to employees who, like [petitioner], * * * do not occupy sensitive positions involving national security." Pet. 14. That argument is without merit. Although employees in non-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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sensitive positions are exempt from the more elaborate investigations required for employees whose jobs may affect national security, the Executive Order expressly states that "[t]he appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation." Exec. Order No. 10,450, § 3(a), 3 C.F.R. 937 (1949-1953 comp.). While the scope of the investigation will vary according to the sensitivity of the employee's position, "in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation." *Ibid*; see Pet. App. 71-72. *Cole* v. *Young*, 351 U.S. 536 (1956), on which petitioner relies (Pet. 15), addressed only the coverage of the "national security" provisions of the Act of Aug. 26, 1950, ch. 803, 64 Stat. 476, as implemented in Exec. Order. No. 10,450. See 351 U.S. at 538, 542 & n.2. It did not address the provisions of the Order applicable to other employees.